

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

G4S Secure Solutions (USA) Inc.)	
)	
Employer,)	
)	
and)	Case 12-RC-203988
)	
International Union, Security, Police)	
and Fire Professionals of America (SPFPA))	
)	
Petitioner.)	

**EMPLOYER’S REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S
DECISION AND DIRECTION OF ELECTION**

Fred Seleman, Esq.
Vice President, Labor & Employment Law
G4S Secure Solutions (USA) Inc.
1395 University Boulevard
Jupiter, FL 33458
Phone: 561.691.6582
Fax: 561.691.6680
Email: fred.seleman@usa.g4s.com

Attorney for Employer
G4S Secure Solutions (USA) Inc.

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“Senior Director of Nuclear Operations Mareth testified that in January 2016, the Employer determined that lieutenants did not appear to be actively involved in the recommendation and issuance of the discipline, and that the captains were performing those functions.”

“Thus, it appears from Mareth’s testimony that lieutenants are required to obtain approval from captains before issuing discipline. Project Manager Scott testified somewhat differently than Mareth in this regard. According to Scott, lieutenants may administer oral and written warnings for lower-level misconduct and attendance issues, and that lieutenants independently investigate incidents that may warrant discipline and may independently issue warnings without seeking permission from anybody else or having to make a recommendation to anybody higher in the chain of command.”

“Project Manager Scott acknowledged that none of the work performance disciplinary notices establish that the lieutenant who signed the disciplinary notice actually independently investigated the matter or issued it without seeking guidance from a captain or other superior manager (such as Operations Coordinator Rodriguez), and that he has no knowledge as to who investigated the incidents that led to the performance disciplines signed by lieutenants, or as to whether the lieutenants obtained guidance or approval from any superior officers or managers regarding the issuance of these disciplines.”

“The record shows that the vast majority of the disciplines signed by lieutenants since the Employer acknowledged the lack of involvement of lieutenants in the disciplinary process in 2016, are disciplines for attendance infractions. The record shows that the attendance disciplines

issued by lieutenants have been determined based on a mechanistic application of the Employer’s attendance policy. Moreover, it appears from the PIP in evidence that captains are responsible for informing lieutenants about attendance infractions in the first instance, thereby initially prompting the lieutenants to create attendance disciplines. In addition, the evidence shows that captains provide guidance to lieutenants to make sure that they are issuing the correct level of warning.”

“Although lieutenants may choose to issue a coaching instead of a warning in certain instances, coachings are considered non-disciplinary, and the issuance of a coaching does not appear to result in discipline for subsequent infractions of the same nature. Despite the testimony that lieutenants may counsel or coach a SO [Security Officer] for a first offense and issue a discipline to the same SO for a second such offense, only two documented coachings were entered in evidence, and there is no evidence of a warning notice being issued for an offense for which a SO had previously received a documented coaching from a lieutenant. In addition, the coaching form and Employer policy specify that a coaching is non-disciplinary, and do not contain any link between documented coaching and discipline.”

B. Role of Response Team Leader in Force-on-Force37

“There is no evidence of an actual attack or threat requiring deployment of the response team, but the Employer has conducted drills requiring deployment of a response team. In Project Manager Scott’s experience as a lieutenant, as a response team leader he has led two to three armed SOs in drilled response.”

“Each security squad completes at least one annual full-scale drill of a “security contingency” event, with certain employees playing the part of intruders while others practice defending. At least annually, the NRC observes a full-scale drill to ensure the readiness of the security team to respond in the event of a terrorist attack. Other small-scale drills occur with the use of a tabletop model of the facility. In these drills SOs and lieutenants move game pieces representing themselves around the model while the circumstances of the drill are announced.”

“The Employer contends that lieutenants exercise supervisory authority with respect to the assignment of work in the occasional force-on-force trainings, during which lieutenants direct specific movements of SOs in response to mock attacks on the Turkey Point nuclear power facility. However, the direction of such discrete tasks in the context of training exercises held only occasionally does not constitute the exercise of supervisory authority with respect to the assignment of work. The

assignment must instead affect an employee’s shift, place of work or department, and overall duties. SOs’ overall duties are dictated by their job description and the general purpose log that exists for their particular assigned post.”

“I also find that there is insufficient evidence to show that lieutenants responsibly direct work. In this regard, the Board concluded that there was insufficient evidence that lieutenants at another nuclear power plant, in which the facts are very similar to those in the instant case, responsibly direct the work of security officers: .. the Employer has not established that lieutenants use independent judgment in directing employees in tactical . . . situations. [F]or tactical direction, various witnesses testified that each area and post had very detailed response plans and standard procedures governing responses to real or simulated incidents and emergencies. Although there was testimony about some variables a lieutenant might consider in giving direction, it is vague and lacks even general examples of choices lieutenants make in tactical situations. Id.”

C. Post Swaps43

“Although lieutenants may decide to approve a swap of posts for SOs within a shift, there is insufficient evidence to establish that they exercise independent judgment in deciding whether to approve the swap. Instead, the lieutenants’ decision making in approving mid-shift swaps appears to be routine or clerical in nature, and appear to be based on SO preferences. Such swap requests are generally approved unless there is some reason, like a medically compelled light duty assignment, which prevents the swap.”

D. Fitness for Duty44

“If, during mid-shift, a lieutenant performing a post inspection finds that a SO [Security Officer] is inattentive or otherwise not fit for duty, the lieutenant relieves the SO until the deficiency is rectified (if necessary for the rest of the shift) or calls a spare SO who is on duty to man the post. The record is not clear about the extent to which extra officers are scheduled or available. The post must be covered. Lieutenants may relieve SOs from their posts for various reasons; for example, so the SO may get equipment, use a restroom, or get coffee.”

E. Role in the Hiring Process46

“... a lieutenant’s role on the Employer’s hiring boards, which has only occurred on a single instance by a single lieutenant to date, is merely advisory, and is insufficient to establish that lieutenants have authority

to hire or effectively recommend the hire of employees. The process for hiring includes many components, only one of which is the applicant’s interview with the panel members. Although Project Manager Scott testified that the lieutenant’s input led to the rejection of an applicant Scott might otherwise have hired, this was in response to a leading question and I give this testimony little weight. Moreover, there is insufficient evidence to show that the lieutenant made an effective recommendation as to any applicant who the Employer decided to hire.”

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I. INTRODUCTION AND STANDARD OF REVIEW

The Employer G4S Secure Solutions (USA) Inc. (“Employer”) seeks review of the Regional Director’s Decision and Direction of Election (“DDE”), pursuant to Section 102.67(c) of the Board’s Rules and Regulations. Specifically, the Employer asks the Board to review the Regional Director’s conclusion that the Employer’s front-line supervisors who lead and oversee the security officers that guard a nuclear power plant against attack are not supervisors under Section 2(11) of the Act.

As outlined in detail below, the Employer’s lieutenants have the authority to engage in more than one of the types of supervisory functions set forth in Section 2(11). Regarding the authority to issue discipline, specifically, as Chairman Miscamara recognized in his dissent in *G4S Regulated Security Solutions*, 362 NLRB No. 134 (2015), the same Employer met its burden of proving the same lieutenant job classification at issue in this case had the authority to issue discipline in that 2015 decision. And, this case includes more, and stronger, evidence than the evidence presented in 2010 and at issue in *G4S Regulated Security Solutions*, *supra*.¹ As such, a fair and objective review of the record in this case should lead to the conclusion that the lieutenants have the authority to issue discipline, as well as other types of supervisory authority under Section 2(11) of the Act.

¹ The hearing in *G4S Regulated Solutions*, *supra*, took place in early April 2011 and revolved around facts as they existed in February 2010, at which time the Employer terminated the two lieutenants at issue in that case. Although the Regional Director initially recognized that the facts at issue in that case were the facts as they existed in 2010 (DDE at 3), he later tried to make it sound like that case was decided based on the facts as they existed in 2015 (DDE at 32), the time at which the “final” decision was issued in that case. In doing so, it seems as if the Regional Director was attempting to minimize the amount of time that had passed and the possibility that any changes had been made to the position in the interim.

In deciding that the lieutenants are not statutory supervisors, the Regional Director reached erroneous factual conclusions and otherwise ignored undisputed record evidence in support of the Employer's arguments. In accordance with Section 102.67(d)(2), the Board may grant a request for review on the grounds that "the Regional Director's decision on a substantial issue is clearly erroneous on the record and such error prejudicially affects the rights of a party." Since the Regional Director issued the DDE based on substantive factual errors, which went directly to substantial issues, the Employer's rights were prejudicially affected. As such, the Board should grant the request for review and, on the merits, reverse the DDE and set aside the election or, in the alternative, grant the request for review and allow additional briefing on the merits.

II. PROCEDURAL HISTORY

Petitioner International Union, Security, Police and Fire Professionals of America (SPFPA) ("Petitioner") seeks to represent a unit of "All full-time and regular part-time field supervisors (lieutenants) employed by the Employer at the Turkey Point Nuclear Power Plant in Florida City, Florida; excluding all office clerical employees, security officers, shift supervisors (captains), professional employees, and supervisors as defined in the Act." The Employer contests that this unit as appropriate, since the lieutenants are supervisors under Section 2(11) of the Act.

A hearing was held on August 17 and 18, 2017 ("Hearing"), and the parties filed post-hearing briefs on August 25, 2017. The Acting Regional Director ("Regional Director") issued the DDE on October 17, 2017, in which he determined that the lieutenants are not supervisors under the Act, and directed an election to proceed. (A copy of the DDE is attached hereto as Attachment "A.") The election took place on November 1 and 2, 2017 and Petitioner won the

election. Although not yet issued as of the filing of this Request for Review, it is anticipated that a Certificate of Representative will be forthcoming shortly.

III. FACTS

The Employer provides security services to its client, Florida Power & Light, at the Turkey Point nuclear facility (“Turkey Point”). As part of its services, the Employer oversees a large area owned by the client, as well as the numerous buildings and structures that make up the actual facilities. The Employer’s work at this site is highly regulated by the Nuclear Regulatory Commission (or “NRC”). (Transcript of Hearing (“Tr.”) at 14-15; relevant portions of which are attached hereto as Attachment “B.”)

As part of the services it is contracted to provide, the Employer patrols the relevant areas, provides security assessments and protects the facility from acts of “radiological sabotage,” which is any act by someone intending to cause a release of radioactive material into the general public. (Tr. at 15.) Because of the nature of the work it performs, the Employer has a paramilitary structure at this site. The security officers wear uniforms and carry side arms and contingency weapons, which are a form of long gun. (Tr. at 16.)

The Employer currently employs approximately 182 individuals at Turkey Point, with the security detail broken down into four teams. Each team has approximately 31-36 security officers who are supervised by and report to six field supervisors that hold the rank of lieutenant. Approximately five to seven officers regularly report to each lieutenant. The lieutenants report directly to the captain of their respective shifts who, in turn, reports to the operations coordinator and the project manager. (Employer Exhibits 1 and 7; Tr. at 17, 66-67.)

As field supervisors, lieutenants' primary responsibility is to provide oversight of and direction to security officers. As set forth in the applicable client procedure containing the lieutenants' job description, lieutenants are responsible for ensuring all officers assigned to posts are qualified, understand the requirements of their posts, and properly perform their duties. (Employer Exhibit 4 at 3-4, §3.1(8), (9); Tr. at 54.) As set forth in the Employer's job description, lieutenants provide supervision over security officers; supervise and observe the job performance of the officers and exercise independent judgment in deciding oral and written disciplinary actions to be issued to security officers. (Employer Exhibit 5 at 2, §IV, Priority 1, §V, first bullet.)

Current Project Manager James Casey Scott testified about the overall job responsibilities of lieutenants. In addition to the fact that Project Manager Scott is ultimately responsible for the entire security force at Turkey Point, including the lieutenants, he also served as a lieutenant at Turkey Point from approximately September 2011 through March 2016. (Tr. at 52-53.) As Scott explained, if a lieutenant determines that an officer is not qualified for a particular post or position, the lieutenant would not allow the officer to go on duty, which could lead to the officer's removal from duty that day and loss of pay. (Tr. at 55.) A lieutenant also must ensure that an officer is alert, attentive and "fit for duty." (Tr. at 56-57.) When asked what kind of factors a lieutenant must consider in making such a decision, former lieutenant Scott testified:

The lieutenant would have to consider his experience with that officer, understand what that officer's personality type is like and how that officer would normally present themselves in terms of posture, the way that he would speak, his mannerisms, and things like that. So the lieutenants are qualified to perform fitness for duty assessments where they would recognize anything aberrant about that, somebody who's maybe slurring his words or appears drowsy, appears confused, anything that might indicate that he was not capable of performing his duties.

(Tr. at 56-57.)

William Campbell is currently employed as a lieutenant at Turkey Point, and has been employed in that capacity since October 2016. (Tr. at 180.) Although called as a witness by the Petitioner, Lieutenant Campbell corroborated Project Manager (and former Lieutenant) Scott's testimony about the lieutenants' role in determining if an officer is not fit for duty.

Q. When it comes to fitness for duty, how do you decide whether a particular security officer is demonstrating aberrant behavior?

A. Well, if you know the security officer, you have to take on their past, right? So if you know the person is normally very energetic and they're not very energetic, then you've got to kind of -- that should be an indicator. Of course, there's the obvious stuff, if you smell alcohol and the type of things that we take through training, but --

...

Q. So when you're determining that somebody is not as energetic as they normally would or you smell alcohol, what are you considering, what are you thinking about when you're deciding, well, this person looks like something is off today?

A. I'm wondering if they're able to do their job. Are they in a capacity where they can work, fitness for duty. Fitness for duty also includes mental capacity. They could have family issues at home. They could have other things happening where they're just not in the mind frame to be there.

Q. Okay. So you're thinking about your knowledge of that security officer based on your past dealings with that security officer, right?

A. Yes.

Q. As somebody who is overseeing the work done by that security officer, right?

A. Yes.

Q. And you're determining whether what you are observing on that given day in terms of that security officer is different than what you have observed from that security officer on past occasions?

A. That's correct.

Q. And you are deciding that something doesn't seem quite right, correct?

A. Correct.

Q. And then based on those different sorts of factors, you then decide whether to relieve that person from duty, correct?

A. Not necessarily.

Q. Can you make that decision?

A. Yes, I can make that decision, yes.

Q. And can you make that decision on your own?

A. Yes.

(Tr. at 194-196.)

As Project Manager (and former Lieutenant) Scott and Lieutenant Campbell testified, if a lieutenant determines that an officer is not fit for duty, the lieutenant has the authority to relieve the officer from duty. If that happens, the officer could be sent home and lose pay for the rest of the shift. (Tr. at 57-58, 196-197.)

Lieutenants have been provided additional various documents that highlight their supervisory responsibilities, which they were asked to review and sign acknowledging their understanding of these responsibilities. For example, almost all of the current lieutenants have acknowledged on a document entitled, "Supervisory Requirements," that they are required to "[u]se coaching techniques . . . , counseling and progressive discipline to correct unprofessional conduct and poor job performances," "lead by example" and "keep issues discussed between supervisors confidential." (Employer Exhibit 8 at §§ 3, 10 and 13; Tr. at 70-71, 161.)

In another document that reflected that they were part of the management team with authority over their subordinates, called the "Management Challenge," all (or all but one) of the

current lieutenants answered affirmatively to the question, “As a supervisor, do you consider yourself a leader?” (Employer Exhibit 9 at 2; Tr. at 72, 161.) They also explained in their own words their desire to supervise security officers, and their strategies for establishing the respect of their subordinates. (Employer Exhibit 9.)

Consistent with their job responsibilities set forth in the above-referenced documents, lieutenants have the authority to issue disciplinary actions to the security officers that report to them, and are expected to exercise that authority. (Tr. at 18-20, 33, 36, 44.) For oral warnings and written warnings, they may do so independently and without any involvement by anyone higher in management. (Tr. at 44, 109.)

When a security officer engages in some form of misconduct, the lieutenant responsible for that security officer is expected to review the underlying misconduct, any applicable policy, any past discipline issued to other officers for similar infractions, etc. and then make a decision. For many infractions, the lieutenant can exercise his or her discretion to issue a non-disciplinary coaching. Or, the lieutenant can decide to issue a disciplinary notice. If the lieutenant decides to issue discipline, there are some offenses for which the lieutenant must determine, based on the severity of the offense, what level offense is applicable under the relevant policy. (Tr. at 83-86.)

Generally speaking, there are two policies pursuant to which lieutenants issue discipline to security officers – the Progressive Discipline Policy and the Attendance Policy. (Employer Exhibits 2 and 16.) Pursuant to the Progressive Discipline Policy, there are three levels of offenses. Level III consists of the lowest level offenses, with progressive disciplinary actions for each subsequent violation. Level II is the next highest level. Level I is the highest level, for the most serious offenses, and for which termination is the recommended disciplinary action.

(Employer Exhibit 2 at 5-8.) Generally speaking, a written counseling is the appropriate discipline for a first offense under Level II, followed up by a written counseling and suspension for a second offense, and discharge for a third offense. Generally, an oral counseling is issued for a first offense under Level III, followed up by a written counseling for a second Level III offense. (Employer Exhibit 2 at 8.) As noted in the policy, however, the level of offense based on the type of misconduct and the grid with proposed discipline are guidelines only. (Employer Exhibit 2 at 5, 8; Tr. at 86 (Project Manager Scott explaining that the listed disciplinary actions are not “set in stone”).) In addition, certain types of misconduct may fall under Level II or Level III, specifically, “[f]ailure to meet satisfactory job performance or behavior standards in the opinion of management.” (Employer Exhibit 2 at 7.)

The Employer’s Attendance Policy is similarly progressive in nature. (Employer Exhibit 16.) The progression is different based on the type of attendance infraction. For example, an oral counseling is generally considered the appropriate discipline for a first tardy in a rolling twelve-month period, while a written counseling is generally issued for a first unexcused absence and a suspension is often warranted for a first offence of a no call/no show. (Employer Exhibit 16 at 3-4.)

As such, but for Level 1 offenses under the Progressive Discipline Policy, (which justify termination for the first offense), security officers will suffer more severe penalties if they commit similar infractions – both attendance and other performance issues - for which lieutenants have previously disciplined them. (Tr. at 110.) In other words, under both policies, the discipline issued by lieutenants constitutes the initial steps in a progressive disciplinary system that may result in further consequences to employees and affect their job status, including suspension (or further suspension) and termination. (Tr. at 110; Employer Exhibits 2 and 16.)

Before Scott was promoted, Michael Mareth was the Project Manager at Turkey Point. (Tr. at 14.) Mareth testified that, as far as the Employer was concerned, lieutenants always have had the authority to issue oral and written warnings to the security officers that reported to them, without consulting with a superior, and have exercised that authority. (Tr. at 19-20, 36.)

While there might have been some lieutenants that did not understand their role in this regard in terms of issuing discipline to the security officers that reported to them, it is undisputed that other lieutenants did. For example, Project Manager (and former Lieutenant) Scott testified about a written warning that he issued to a security officer named Camille Harrison in 2013 for unprofessional conduct, while he was working as a lieutenant. (Tr. at 82-83; Employer Exhibit 10.) As Scott explained:

Q. Would you please walk us through the process that led to you putting your signature on this document?

A. Sure. So what this particular scenario, I had observed the misconduct by this officer. I decided that it warranted discipline. So I went and reviewed the discipline policy [Employer Exhibit 2] to determine what level of discipline was appropriate based on the events. Within that policy -- the policy gives you guidance as far as what level of discipline to issue, but there are certain areas that could be different categories of severity. We talk about Level I, II, and III offenses.

In this case, I rated this as a Level II offense for failure to meet satisfactory job performance. That's one of those things that could be considered Level I, II, or III, based on circumstances that can't be covered by procedure because the circumstances could be so widely varied.

So this was something to where I felt that the level of misconduct warranted going to a Level II type of offense and therefore issuing a written warning. I would have talked with my captain, Captain Johnson, to seek out, I don't want to say concurrence from her, but to get a quality check from her to ensure that I was on the right page as far as that being an appropriate level of discipline to issue. And then I took the action to issue the discipline.

Q. Was it your decision to characterize this as a Level II offense for failure to meet satisfactory job performance?

A. Yes. That was my decision.

...

This particular instance was what I considered to be a Level II. So if you look on page 7 [of the Progressive Discipline Policy, Employer Exhibit 2] under the Level II section, the very last bullet in the Level II section says, "Failure to meet satisfactory job performance or behavior standards." If you look down at the very bottom of that page, under Level III, the very last bullet on Level III says the exact same thing.

So with that particular item, that's something that could fall into Level I, II, or III in terms of how severe the offense is, and that's something where the lieutenant would make a judgment call based on circumstances as they may be. You can't possibly cover every single one of those in the policy, so that gives us leeway to make judgment call.

... I could have used discretion and treated that as a Level III offense. I could have conducted simply a verbal coaching, which would not be discipline, if I felt that that would be effective. But based on the circumstances involved in that scenario, I felt that it warranted a Level II and therefore a written warning for a first offense at that level.

(Tr. at 83-86.)

When asked how he knew he had the authority to take the actions outlined above, former Lieutenant Scott responded: "Everything that I have been trained to do during the promotion process after I was selected to be a lieutenant trained me that I was a lieutenant. I had the responsibility and the obligation to uphold all the standards and policies, one of which is the progressive disciplinary policy. So that's a core responsibility of being a supervisor or a lieutenant." (Tr. at 87.)

While there may have been some confusion in the past amongst some of the lieutenants and captains regarding the lieutenants' role in the issuance of discipline to the security officers that

report to them, starting in January 2016 and continuing to the present, the Employer has taken numerous actions to reinforce the lieutenants' authority in this regard, and the expectation that they exercise such authority. (Tr. at 19-20.) Specifically, in early 2016, former Project Manager Mareth outlined to Operations Coordinator Juan Rodriguez his expectations in this regard. (Tr. at 20-21.) As directed by Mareth, Operations Coordinator Rodriguez then sent an email to all of the captains (and lieutenants who served as back-up captains on occasion in place of a regular captain) explaining the expectation about the lieutenants' role in the issuance of discipline to the security officers: "Captains, You need to reinforce the need for Supervisors to be actively involved in the determination process and issuance of documented coaching's [sic] and as applicable discipline action. . . . Simply stated the Lieutenants are supposed to be the ones putting together coaching's [sic] and as applicable discipline for their direct reports to include the issuance part. . . . The Captain is the one that handles suspensions and above." (Tr. at 20-21; Employer Exhibit 3.)

Former Project Manager Mareth and Operations Coordinator Rodriguez then followed up with group meetings with the captains to further discuss this expectation regarding the lieutenants. As Mareth testified:

We had [a] meeting, specific with the captains, to discuss what it is that we felt we were not doing, as far as meeting the expectation, hitting the mark, communicating that the captains needed to ensure that the lieutenants were actively involved in the disciplinary policy, exercising their own judgment and coming to the shift captains with recommendations as far as what they believed should be the appropriate discipline issued, whether it was attendance or misconduct, because that was the part that we felt that we weren't hitting the mark on after we first communicated this previously.

(Tr. at 23-24.) These meetings took place in January and February of 2016. (Tr. at 23-24, 26.)

Former Project Manager Mareth then followed up in January and February of 2016 with all of the captains at that time, including Charles Feldman, Kevin Reyes and Charlotte Johnson, to

reinforce this message. (Tr. at 23-24, 26.) Mareth testified in detail about the nature of the expectation he relayed to each of the captains:

So I reinforced . . . the expectation was that they have their first-line supervisors, the lieutenants, be involved in that process, the disciplinary policy allows for that, and that we wanted them [lieutenants] to be involved in that process. And they needed to coach them [lieutenants] into -- coaching meaning reinforce, explain to them why they needed to be involved in it, and have them actually involved in that process. . . . Involved simply means that they [lieutenants] can read the policy, they understand the policy. They [lieutenants] can actively determine what type of discipline should be issued and make a recommendation based on their understanding of the policy and their understanding of the either misconduct or the attendance deficiency. And recommendation could be made to the captain. And the captain should allow them to be involved in that process to go ahead and issue that discipline.

(Tr. at 25-27.)

Soon after Scott was promoted from lieutenant to project manager, he took further actions to reinforce the expectation that lieutenants exercise their authority to discipline security officers. (Tr. at 91-92.) Specifically, on July 1, 2016, Project Manager Scott sent an email to all lieutenants and captains in which he stated, “Please review the below email from Mike [Mareth] pertaining to the responsibilities of first line supervisors. This is part of the reason why we have been continually reinforcing the expectation that LTs [Lieutenants] issue discipline to their own direct reports.” (Tr. at 92; Employer Exhibit 12 at 1.) As Scott testified, the “intent behind this email was primarily to reinforce the expectation, which was that lieutenants independently investigate the circumstances involving misconduct or attendance issues, which may warrant those lower levels of discipline, and take action to issue that discipline on their own without being prompted by a captain or somebody above a captain to do so.” (Tr. at 93.) (Lieutenant William Campbell confirmed that he received at least two emails explaining that, as a lieutenant, he was expected to issue lower level discipline to his security officers on his own. (Tr. at 197.))

As time progressed, Project Manager Scott would sometimes see disciplinary actions issued to various personnel. When he came across a disciplinary notice signed by a captain and issued to a security officer, he would follow up with the captain to reinforce his expectations that lieutenants actually determine the level of discipline to be issued to security officers. As he explained,

I would reinforce with the captains when I started seeing things that were issued by captains versus lieutenants that should have been issued [by] lieutenants that, again, the lieutenants were the ones that were supposed to be issuing the discipline for lower-level offenses.

. . . The intent there would be that the lieutenant is actually investigating the circumstances surrounding the attendance issue or the misconduct, and either issuing the discipline himself, meaning reviewing the policy, reviewing the individual's past history, and deciding what level discipline is warranted, and then taking the action independently without getting permission from a superior to issue that discipline for those lower level offenses.

If it's something that warrants a suspension or a termination, certainly they would make a recommendation to the captain who would actually issue the suspension in accordance with our policy.

(Tr. at 95-96.) Scott recalls specifically having such follow up communications with Captains Feldman and Lee Evans. (Tr. at 97.)

Captain Evans, however, did not comply with Project Manager Scott's instructions in this regard. As a result, and because of other deficiencies, Scott issued Evans a Performance Improvement Plan ("PIP") on July 20, 2017. (Tr. 97-98; Employer Exhibit 13.) As part of the PIP, Captain Evans was given the following objective:

Supervisors shall issue discipline to their direct reports in accordance with G4S policy and consistent with past practices. For issues which a supervisor [lieutenant] does not directly observe (e.g. attendance-related), Capt. Evans will notify the responsible supervisor of the event. The supervisor [the lieutenant] will then independently create and issue the appropriate level of discipline without further prompting.

(Employer Exhibit 13 at 2, Performance Improvement Objective 2(d) .) As Project Manager Scott testified, Captain Evans was given ninety days from the date the PIP was issued to correct his behavior. If Captain Evans fails to take the necessary steps to force his lieutenants to issue discipline on their own by September 20, 2017, he will be demoted or terminated. (Tr. at 99.)

Consistent with the Employer's expectations outlined above, lieutenants have issued more than one hundred disciplinary actions to security officers since the start of 2016. (Employer Exhibits 14-15; Tr. at 99-101, 104, 224-229.)²

Stephen Bonnell was a lieutenant for approximately eleven years before he was promoted to the position of captain in August 2016. (Tr. at 132.) Bonnell testified regarding his recollection of the "change" that occurred a few years ago, while he was still a lieutenant, shortly before he was promoted. After that "change," "there was more of a push to get the lieutenants to be involved without guidance or direction from the captains to issue documents, to issue coachings or discipline actions." (Tr. at 133.)

Captain Bonnell testified that, after the change but while he was still a lieutenant, he issued discipline to security officers for various offenses, including ones that were not attendance infractions. (Tr. at 133.) For example, he specifically recalls issuing discipline to Security Officer Albert Denis in 2016 because of an incident when Denis ignored some signs that were supposed to guide his actions. Although Bonnell chose to issue Denis an oral warning, he testified that he

² It is irrelevant that some captains and some lieutenants to date have refused to comply with instructions and expectations outlined by the Employer, or that some lieutenants have never issued discipline to security officers based on their own determination. The undisputed fact is that the captains and lieutenants have been told that lieutenants have such authority and are expected to exercise that authority, and some captains and lieutenants have proceeded accordingly.

could have issued a coaching instead. Bonnell also testified that he could have issued discipline for this offense under Level II or Level III of the Progressive Discipline Policy. He did not consult with anyone else before issuing this disciplinary action. (Tr. at 133-134, 143-144.)

Max Tai is currently a lieutenant, who was called as a witness by the Petitioner. Lieutenant Tai, apparently, does not yet understand the Employer's instruction that he as a lieutenant is expected to take appropriate action to issue discipline to his security officers. Although Lieutenant Tai tried to make it sound like he does not exercise any authority in this regard and does not make a "recommendation" to his captain regarding the level of discipline to be issued an officer, he admitted on cross-examination that he goes to his captain – Captain Johnson – already with an idea of the appropriate discipline to be issued to an officer. He makes a "suggestion" and he is merely asking her for a "validation." (Tr. at 318.)

Q. . . . When you go to Captain Johnson, do you go to her with some suggestion? I mean, you've already investigated and considered this. Do you go to her and say, hey, this is what I'm coming up with. I think this is an oral warning?

A. Yeah. Essentially, it's a validation.

Q. Okay. So you go to her already with your own idea of what the appropriate result is, and then you're checking with her to make sure that sounds right?

A. Depending on the procedure, absolutely. If there is a procedure violation, yes.

(Tr. at 318.)

Because of the nature of the type of misconduct in which security officers regularly engage, many of the disciplinary actions issued by lieutenants to security officers are for attendance

infractions. Under the Attendance Policy, however, a lieutenant (or captain) does not just blindly apply the policy. As Project Manager (and former Lieutenant) Scott testified,

The lieutenant would look at things besides the policy. The policy provides the guidelines based on the type of attendance issue, but the lieutenant would give consideration to any other mitigating circumstances. If we're talking about an attendance issue, maybe there were things outside of the employee's or the officer's control, such as sick children, car trouble, and so on. The lieutenant would consider those things.

The lieutenant would also look at the individual's past history and look at his personnel summary to see had he been late in the past or had unexcused absences, so on and so forth, and take all of those things into account when determining what level of discipline is appropriate for a particular offense.

(Tr. at 111.) When asked whether a lieutenant could decide to issue a coaching rather than discipline for an attendance infraction, Scott responded, "Lieutenants have certainly shown discretion in the past for those lower-level things If somebody is 30 seconds late, a lieutenant may choose not to pursue discipline for something like that." (Tr. at 111-112.)

Lieutenants do not only issue discipline for attendance-related issues. And, in doing so, they sometimes issue discipline for an infraction that could reasonably result in a higher level of discipline or lower level coaching. For example, Project Manager Scott testified about three disciplinary actions issued by lieutenants between 2016 and the present that were not based on attendance issues. (Employer Exhibit 17; Tr. at 112-116.) First, Lieutenant John Macrina issued an oral warning to Security Officer Jaspen Bishop on February 20, 2016 for multiple infractions. (Employer Exhibits 15, 17 at 1.) As Scott testified, the "lieutenant that issued this made the determination based on his experience with the officer and his knowledge of that officer's past history and his knowledge of the disciplinary policy to issue an oral warning for this particular offense." (Tr. at 112-113.) Although the lieutenant chose to view this a Level III offense under the Progressive Discipline Policy, as Scott testified,

The lieutenant could have gone in different directions. The lieutenant could have made a determination just to go with a coaching, a verbal coaching or a documented coaching if he felt that would be effective. The lieutenant could have gone higher up in the disciplinary scale as far as going to a written warning by considering this a Level II offense if he felt that that was warranted based on the circumstances. So he made a choice. There were other right choices he could have made.

(Tr. at 113.)

Scott testified similarly about an oral warning issued by Lieutenant Gloria Barfus to Security Officer Antoine Geffrard on September 20, 2016. (Employer Exhibit 17 at 2; Tr. at 113-114). As Scott explained, Lieutenant Barfus could have issued a higher level of discipline based on the misconduct at issue or issued a coaching instead. (Tr. at 113-114.)

Likewise, Lieutenant Michael Stewart issued an oral warning to Security Officer Gary Clayton on February 13, 2017. (Employer Exhibit at 3; Tr. at 114.) The officer was disciplined for being “in a posture that could have been perceived as being inattentive, which is a significant issue in our industry.” (Tr. at 114-115.) As Scott testified, “[t]his was again something where the lieutenant had the ability to use discretion and verbally coach or use a documented coaching if that would have been effective for that officer based on that officer’s history. It also could have resulted in a written warning. With it being an inattentive issue, it could have gone even more significant than that based on the circumstances.” (Tr. at 115.)

As mentioned above, lieutenants also have the authority to issue non-disciplinary coachings to their security officers and to do so without consulting with a superior. (Tr. at 120.) Although coachings are not a disciplinary event, such coachings may be considered in the determination of whether discipline is appropriate if an officer commits similar infractions in the future. (Tr. at 147, 216.) Although Project Manager Scott admits he does not personally know

whether every lieutenant decides by himself or herself to issue a coaching without being directed by a superior, he testified that (a) as a lieutenant, he issued coachings to his security officers without consulting with anyone and (b) nothing has changed since that time in terms of how lieutenants issue coachings. (Tr. at 120-121.)

As Project Manager (and former Lieutenant) Scott explained, “the goal of a coaching would be [to] fix the behavior without having to go to the disciplinary process. And that’s something that a lieutenant or a captain would use, based on their judgment, as to whether or not that would be effective in correcting behavior.” (Tr. at 88.) Scott testified in detail about three occasions when he was a lieutenant and chose to issue a coaching to one of his security officers rather than a disciplinary action. First, he issued a coaching to Security Officer Rafael Del Pino Lopez on December 16, 2015. (Employer Exhibit 11 at 1.) As Scott explained, based on his evaluation of the fact that the officer had not exhibited this sort of behavior before and the type of procedure violation at issue, he decided on his own to use a coaching, even though he could have issued a disciplinary action. That decision was his, and his alone. (Tr. at 88-89.)

Second, Scott issued a coaching to Security Officer Richard Rafford on August 3, 2013. (Employer Exhibit 11 at 2.) As Scott explained, the misconduct at issue was a form of “unsatisfactory job performance” for which he could have issued discipline. Based on his determination that the officer otherwise was an “outstanding officer who normally performs at a very high level” and who had never received discipline for any “job performance-related issues,” Scott “didn’t feel that [he] needed to do that [issue discipline] to correct the behavior. (Tr. at 89-90.)

Scott also issued a coaching to Security Officer Chris Rugel on August 14, 2013. (Employer Exhibit 11 at 3.) He explained his reasoning in issuing a coaching rather than a disciplinary action for that incident:

Q. Did you decide to issue a coaching for this incident?

A. Yes. This is again a safety-related job performance issue that I observed. Again, based on this officer's history, I believed that documenting the coaching would be sufficient to get him to change the behavior. It was a safety violation, so it certainly could have resulted in discipline had I wanted to pursue that route, but I felt that coaching would have been effective. And it proved to be effective in changing the behavior.

Q. Was there only one right decision for you to make in issuing this coaching instead of a disciplinary action?

A. No. There would have been many right options. Issuing discipline would have been a right decision to make as well. It was just not the decision that I chose to make.

(Tr. at 90-91.)

Captain (and former Lieutenant) Bonnell testified in similar fashion about the decisions he made to issue coachings rather than discipline to security officers when he was working as a lieutenant. As Bonnell stated, he understood as a lieutenant he had the authority to issue coachings on his own and there was an expectation that he do so, when warranted. Generally speaking, Bonnell issued such coachings without prior approval from his captain. (Tr. 135-136.)

Captain Bonnell also testified that, as a captain, the lieutenants that report to him issue coachings to their security officers without consulting with him first, and this happens approximately six times per month. He knows that this occurs because the lieutenants forward written coachings to him after issuing the coachings to their officers. Bonnell also testified that,

based on the underling misconduct outlined in many of the coachings, lieutenants could have decided to issue discipline instead of a coaching in many situations. (Tr. at 136-137.)

Consistent with Captain Bonnell's testimony, Project Manager Scott also testified about specific instances in which a lieutenant issued a coaching, but where the lieutenant also could have properly issued disciplinary action for the incident instead. For example, on April 22, 2017, Lieutenant Eduard Boza issued a coaching to Security Officer Victor Lopez, Jr. for "watching a movie on an electronic device while wearing an earphone." (Employer Exhibit 18 at 1.) Project Manager Scott explained that Lieutenant Boza could have decided to issue discipline at one of several levels – oral or written warning – based on this misconduct. (Tr. at 117.) "Based on this officer's history, the lieutenant made a decision to go with a documented coaching versus a disciplinary action." (Tr. at 117.)

Similarly, on January 24, 2017, Lieutenant Hamraj Ramkissoo issued a coaching to Security Officer Anyea Coleman-Vargas for not properly following X-ray machine protocols. (Employer Exhibit 18 at 3.) Once again, Scott testified that Lieutenant Ramkissoo could have decided to issue disciplinary action for this incident rather than a coaching, had the lieutenant decided to do so. (Tr. at 118.)

In addition to their role in issuing coachings and disciplinary actions, Current Project Manager (and former Lieutenant) Scott testified in detail about the role played by lieutenants in a Force-on-Force. As Project Manager Scott explained, a Force-on-Force "is the general term we use to describe the drills and exercises that we do to validate our defensive strategy is effective." (Tr. at 73.)

So the power plant has a, what we call a defensive strategy plan, which is basically how we respond to terrorist attacks, any sort of security emergency

like that. As part of that defensive strategy, you have individuals that we would consider armed responders. Some of them are in fixed locations. Some of them would respond to specific locations based on our strategy. Other ones would respond to general locations dependent on the nature of the threat.

So you would determine where an attack may be coming from, and you would respond to that location based on the position that you're fulfilling. Some of those responses are automatic. Some of those responses would be directed by supervisors, by lieutenants or captains, filling in the roles of what we would call the response team leader and the alarm station operator.

(Tr. at 74.)³

When asked to explain the role of lieutenants in a Force-on-Force, Project Manager Scott testified:

Then we have the response team leader [or "RTL"], which would also be a lieutenant. That's going to be somebody who's out in a field location. And they're going to be responsible for what we would call generically the response team, which is the group of armed officers that are on duty.

So the response team leader has the responsibility to deploy that response team. Now, as I said, some of them are going to respond to predetermined locations, and some will respond to locations that will vary based on the nature of the attack or the threat. In a situation like that, the lieutenant's going to use his training, skills, and experience to deploy those officers most effectively to effect that strategy.

So the lieutenant, as the RTL, may make a decision based on the conditions of the plant that day to put one officer in one location that would vary from day to day as conditions throughout the plant are constantly changing.

...

So a lieutenant would have to make a determination based on his knowledge of where the threat is coming from, where would he best want to position those responders in order to defend the plant from the threat.

³ Project Manager Scott also explained that his ability to fully explain the Employer's responsive strategy in a Force-on-Force is limited because much of the specific detail is "safeguards" information, which is sensitive and cannot be revealed. (Tr. at 75.)

(Tr. at 76-77.)

When asked specifically what variables might come into play that a lieutenant acting as a response team leader might have to consider in formulating a response, Scott explained:

The lieutenant's going to have to consider a lot of factors. So through their training, their skills, and their experience in our drills and exercises, their knowledge of the layout of the plant, their knowledge of the current conditions in the plant, that's going to affect their decision about where they might deploy some of those responders [security officers].

The lieutenant's going to have to take into consideration things like the equipment or the weapons that the adversaries are carrying, what location they're in, what their proximity is to certain vital plant equipment. The lieutenant's going to have to consider the individual capabilities of the officers.

Every officer is qualified to a certain minimum standard, but some officers are certainly better at some things than others. So if you have somebody who's a better shot, maybe he's a better to position at a further distance. If you have somebody who's faster, maybe you send him, you know, moving a further distance to interdict some adversaries.

The lieutenant has to take all that stuff into account. And a good decision would result in the positioning of his responders [security officers] in the right location to stop a terrorist attack and prevent them from reaching their objective. If a lieutenant makes a bad call, he may put one of those responders in harm's way in terms of crossfire, friendly fire from another officer. If he puts them in the entirely wrong location, maybe the terrorists are able to shoot right past him and reach their objection and cause radiological sabotage.

(Tr. at 78-79.)

Every lieutenant is qualified as a response team leader and one lieutenant is assigned to this role on every shift. As such, all lieutenants perform this function regularly. (Tr. at 77-78.) There are regular Force-on-Force drills conducted through the year, in different ways. There are "tabletop" drills using a mock-up of the physical layout of Turkey Point, during which lieutenants instruct officers how to deploy, as they would in a live drill, and the officers move themselves

around on the “game board.” (Tr. at 158.) Live Force-on-Force drills are conducted for the entire site six to eight times per year, to give every team sufficient opportunities to run through the drills, with drills for smaller groupings performed on a quarterly basis. (Tr. at 158, 162.) There also is a formal Force-on-Force conducted every three years, which is observed by the NRC. (Tr. at 297.)

Project Manager Scott testified about his experiences acting as a response team leader while a lieutenant at this site, and the specific actions he took in directing some security officers.

. . . So serving as a response team leader, and again, without going into specifics that would be sensitive, if we were responding, we were responding to a threat coming from a certain direction, and I had two to three officers or responders with me, based on my knowledge of the plant, I led those officers to a specific location that I knew would be advantageous for us to affect a strategy.

Based on communications that we received from the alarm station operator as to the location and the direction of travel of the adversaries, I took those officers with me and positioned them in locations that they could best use their tactics, concealment, and cover in order to place themselves in between the vital plant equipment and where we knew that the attackers were coming from.

So based on my knowledge and experience with those officers and knowledge of their capabilities, I made decisions about where I wanted to place each officer, which again, is not covered by any policy or procedure; it was based on my judgment as a lieutenant at the time.

Q. Did you consult with a superior before you made those decisions –

A. No.

Q. -- and deployed those people?

A. No. Those decisions were mine alone. They were made based on my knowledge and my experience.

Q. Was that a simulated attack?

A. Yes. That was a simulated attack.

Q. If it was a real attack, based on your decisions, what could have

happened to those security officers that were part of your responders?

A. I certainly make decisions as a lieutenant to put those officers in harm's way. So if I made that bad decision, again, somebody could potentially lose their life, a security officer, if I made the wrong call.

Q. And if somebody lost their life, presumably they would lose their job?

A. Yes. That's correct.

(Tr. at 79-81.)

Lieutenant Campbell corroborated the fact that a lieutenant acting as a response team leader must take variables into account, such as the number of the opposing forces, their weapons, and structural obstacles on site to hide behind, and make decisions on his own about how to deploy security officers. (Tr. at 198.) Campbell also admitted that, based on his decision on how to deploy these officers based on such variables, his decisions "could be the difference between a security officer getting shot or not" and "even dying." (Tr. at 199.)

As part of their regular schedule, security officers are assigned to various posts. Posts differ based on such factors as: whether the post is located indoors or outside; whether the post requires the officer to climb stairs; whether the post is inside an armored room (called a "BBRE"); whether the post is mobile or stationary; whether the post requires greater physical effort; and the proximity of a post to a bathroom, vending machines, water fountain and/or a microwave. (Tr. at 138-141.) It is undisputed that some security officers prefer certain posts over others based on the factors outlined above. (Tr. 138-139, 141.)

As former Lieutenant) Bonnell testified, lieutenants have the authority to transfer security officers from one post to another and do not need to consult with a superior before exercising such authority. (Tr. at 141.) As Bonnell explained, lieutenants exercise that authority regularly, almost

on a daily basis. As a lieutenant, he made these decisions based on his consideration of various factors, such as “requirements that were going to be happening at that post that day;” “certain conditions that were there that I did not want a certain individual there or what other purpose I decided and didn’t allow that post change;” “there were maybe some work activities or some condition to that post that maybe the individual is not aware of that I was aware of that I didn’t think that individual was the best candidate for that position at that time;” his knowledge of the individual; his experience and relationship with the individual; his experiences with the individual “as far as what he was able to do or not;” and the individual’s abilities or needs (such as the need to be closer to a restroom that day). (Tr. at 141-143.) Based on his consideration of such factors, he would sometimes refuse the security officers’ request to swap posts. (Tr. at 141.)

Lieutenants also play a role in the hiring process relative to security officers. Project Manager Scott testified about a specific situation concerning Lieutenant Eduardo Boza. Boza was part of a team that interviewed between 10 and 15 applicants for security officer positions in 2017, and then discussed each applicant with the other team members. As part of this process, Boza had the same opportunity to provide input regarding a candidate as the rest of the team, which included Scott. Although Boza and Scott generally agreed on how they viewed applicants, Scott recalls one specific occasion when Boza had a different opinion than Scott about a specific individual. Boza swayed Scott’s opinion and, as a result, Scott did not offer that applicant a position as security officer. Scott admits that, but for Boza’s input, Scott would have offered that person a position. (Tr. at 124-125.) Although the opportunity to do so again has not yet presented itself, Scott intends to involve a lieutenant similarly in future team interviews of applicants for security officer positions. (Tr. at 125.)

Lieutenants are treated differently than the security officers that report to them in numerous other ways:

- lieutenants attend management only meetings, including MRM meetings at which management reviews each team's performance;
- they receive various communications that are not distributed to security officers;
- they attend shift briefings before each shift that do not include security officers;
- lieutenants have longer regular shifts than officers because of additional time on the front end from shift briefings and additional time on the back end because of turnover issues;
- they receive additional training, including an additional six to eight weeks of specialized training upon promotion to lieutenant and 24 hours of leadership training each year;
- they are paid higher wage rates: the lowest paid lieutenant makes approximately \$5.00 per hour more than the highest paid security officer;
- they are eligible for a larger annual bonus than the security officers; and
- they wear a different uniform – a different color shirt - than the officers.

(Tr. at 128-129.)

Quite simply, it is inconceivable that the Employer could properly provide security services at Turkey Point if lieutenants are not supervisors. If the lieutenants are not supervisors, generally speaking, that would leave one captain overseeing at least 42 other individuals – 36 security officers plus 6 lieutenants. (Tr. at 130; Employer Exhibit 7.) In light of the number of individuals to be supervised, and the large area and numerous buildings and facilities to be overseen, there is no way the Employer could operate that way.

There is no question that Project Manager Scott considers lieutenants to be part of supervision (Tr. at 129), and that the Employer considers lieutenants to be supervisors. The word “supervisor” is in the official title for the position – field supervisor for lieutenants. As Project

Manager Casey Scott testified, “28 different supervisors . . . also help run the individual shifts, 4 shift captains and 24 lieutenants.” (Tr. at 53.)

The lieutenants also consider the lieutenants to be supervisors. Witnesses called by Petitioner referred repeatedly to lieutenants throughout the hearing as “supervisors.” (Tr. at 207, 208 (Lieutenant Campbell refers to another lieutenant as a “supervisor”); 308 (Lieutenant Tai refers to lieutenants generally as “supervisors”).) Lieutenant Campbell admitted that the Employer pays lieutenants more than security officers because “they are given more accountability,” and “the buck’s going to land on you [the lieutenant] a lot more for making sure that the security officers that report to you are doing their jobs properly.” (Tr. at 200.)

IV. ANALYSIS OF REGIONAL DIRECTORS ERRORS

A. Issuance of Discipline

The Regional Director concluded that, “Senior Director of Nuclear Operations Mareth testified that in January 2016, the Employer determined that lieutenants did not appear to be actively involved in the recommendation and issuance of the discipline, and that the captains were performing those functions.” (DDE at 12.) The Regional Director was not entirely accurate in reaching the above-stated conclusions.⁴

Mareth testified that lieutenants had such authority before early 2016 and there was an expectation that lieutenants perform this function. (Tr. at 19-20.) It came to his attention,

⁴ Although there was a transcript of the Hearing, and the Employer cited to the transcript regularly in its post-hearing brief, the Regional Director did not generally cite to specific pages from the transcript in support of his factual conclusions. As such, the Employer must make certain assumptions about the testimony on which the Regional Director relied in support of any particular conclusion.

however, that the Employer was not “meeting that mark as we had expected,” in terms of the lieutenants’ role in the disciplinary process. (Tr. at 20.) Mareth did not testify that none of the lieutenants were issuing discipline to their subordinate officers in the intended manner, but that it came to the Employer’s attention that not all of the lieutenants were performing this function as expected. (Tr. at 33-34.)

In reaching his conclusion, the Regional Director ignored undisputed record evidence of lieutenants that issued discipline independently. Specifically, while working as a lieutenant, Scott issued a written warning to security officer Camille Harrison in 2013. (*See supra* at 9-10; Tr. at 82-83; Employer Exhibit 10, a copy of which is attached as Attachment “C.”) He did so after making a recommendation to his captain, with which she agreed, and Scott then proceeded. (Tr. at 84.) Similarly, while working as a lieutenant, Bonnell issued an oral warning to Security Officer Albert Denis, and did not consult with any superior before making that decision and issuing the oral warning. (*See supra* at 14-15; Tr. at 133-134, 143-144.)

The Regional Director also relied upon some slight inconsistencies between the testimony of Mareth and Scott to justify the conclusion that lieutenants do not have the authority to issue discipline under Section 2(11) of the Act. As the Regional Director stated, “Thus, it appears from Mareth’s testimony that lieutenants are required to obtain approval from captains before issuing discipline. Project Manager Scott testified somewhat differently than Mareth in this regard. According to Scott, lieutenants may administer oral and written warnings for lower-level misconduct and attendance issues, and that lieutenants independently investigate incidents that may warrant discipline and may independently issue warnings without seeking permission from anybody else or having to make a recommendation to anybody higher in the chain of command.” (DDE at 15.)

In reaching this conclusion, however, the Regional Director overlooked that either of those outcomes would constitute proof that lieutenants have the authority to issue discipline under Section 2(11). In other words, whether lieutenants sometimes make their own decisions and issue discipline or whether they sometimes make a recommendation to their captains and then, after receiving confirmation, issue discipline, either of those processes would meet the requisite test for the authority to discipline. As the Employer believes a fair reading of the record reveals, the Regional Director seemed to go out his way to draw every possible inference against the Employer. Any perceived inconsistencies between the oral testimony by various witnesses (and related written communications) on this issue, however, do not mean the Employer failed to meet its burden that the lieutenants have the authority to issue discipline. On the contrary, all of the testimony offered by Mareth and Scott (and the written communications introduced into evidence) demonstrates the Employer's repeated efforts to reinforce the lieutenants' role in the issuance of discipline, whether that role be based on the authority to independently issue discipline or the authority to issue discipline after making an effective recommendation to a captain.

In reaching his erroneous conclusion, the Regional Director also ignored testimony of another lieutenant – Max Tai – who was called as a witness by Petitioner. Although Lieutenant Tai initially tried to deny that he makes recommendations to his captain regarding issuance of discipline to his subordinate security officers, he admitted on cross-examination that he does so. As he admitted, he goes to his captain with a “suggestion” for an appropriate discipline to issue to a security officer, merely seeking “validation” from her before he issues the discipline. (*See supra* at 15; Tr. at 318.) It is clear that, despite his effort to avoid testifying in this regard, Lieutenant Tai admitted that he makes effective recommendations to his captain, and then proceeds with the issuance of discipline.

The Regional Director also concluded: “Project Manager Scott acknowledged that none of the work performance disciplinary notices establish that the lieutenant who signed the disciplinary notice actually independently investigated the matter or issued it without seeking guidance from a captain or other superior manager (such as Operations Coordinator Rodriguez), and that he has no knowledge as to who investigated the incidents that led to the performance disciplines signed by lieutenants, or as to whether the lieutenants obtained guidance or approval from any superior officers or managers regarding the issuance of these disciplines.” (DDE at 16.)

While the foregoing statement is true “on its face,” the Regional Director’s conclusion in this regard did not take into account the context in which that statement was made. When questioned by Petitioner’s counsel on his knowledge of whether, and to what extent, each lieutenant that signed the respective discipline consulted with a supervisor first, Project Manager Scott responded that he did not personally have such knowledge, but expected that each lieutenant issued the discipline based on his or her own determination, or a recommendation to a captain, based on the clear instructions that had been relayed to all captains and lieutenants by that time. (Tr. at 115-116.) As such, while there may be reason to conclude that not every one of the disciplinary notices was issued independently by the listed lieutenant, there is no reason to believe that none of those disciplinary notices were issued independently by the listed lieutenant (or after making an effective recommendation to a captain). Since all of the lieutenants (and captains) had been repeatedly instructed on the lieutenants’ correct role in the process, there is every reason to believe that many of the disciplinary notices were issued by lieutenants in accordance with the instructions repeatedly relayed to lieutenants and captains by Mareth, Rodriguez and Scott.

As Chairman Miscamara explained in his dissent in *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 6, “The majority rejects this evidence, but I believe their reasons do not

withstand scrutiny. The majority first contends that the Respondent failed to disprove the possibility that the lieutenants were merely signing documents prepared by higher-ranking supervisors. Yet, the documents indicate on their face that they were prepared and signed by lieutenants. Under the applicable preponderance of the evidence standard, the Respondent was not required to exclude speculative possibilities.” For the same reasons, the Regional Director incorrectly concluded in this case that lieutenants did not issue discipline on their own or after making an effective recommendation to their respective captains.

The Regional Director next concluded: “The record shows that the vast majority of the disciplines signed by lieutenants since the Employer acknowledged the lack of involvement of lieutenants in the disciplinary process in 2016, are disciplines for attendance infractions. The record shows that the attendance disciplines issued by lieutenants have been determined based on a mechanistic application of the Employer’s attendance policy. Moreover, it appears from the PIP in evidence that captains are responsible for informing lieutenants about attendance infractions in the first instance, thereby initially prompting the lieutenants to create attendance disciplines. In addition, the evidence shows that captains provide guidance to lieutenants to make sure that they are issuing the correct level of warning.” (DDE at 30.)

The Regional Director’s conclusions set forth above are erroneous for various reasons. First, there was no testimony presented that Employer Exhibit 14 consisted of all disciplinary notices issued from early 2016 to the present. Second, although most of the notices contained therein are related to attendance issues, not all of them fall in that category. (*See* Employer Exhibit 14, pages 14-9, 14-20, 14-40, 14-57, and 14-65, relevant portions of which are attached hereto as Attachment “D.”)

Third, the Regional Director seeks to minimize the importance of the lieutenants' role in issuing discipline under the Attendance Policy because there is a detailed policy on attendance. As the Board stated in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006), however, "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." Moreover, the undisputed record evidence is that lieutenants have discretion in whether to take no action, issue a non-disciplinary coaching or issue discipline under the Attendance Policy for a particular incident. As Scott testified,

The lieutenant would look at things besides the policy. The policy provides the guidelines based on the type of attendance issue, but the lieutenant would give consideration to any other mitigating circumstances. If we're talking about an attendance issue, maybe there were things outside of the employee's or the officer's control, such as sick children, car trouble, and so on. The lieutenant would consider those things.

The lieutenant would also look at the individual's past history and look at his personnel summary to see had he been late in the past or had unexcused absences, so on and so forth, and take all of those things into account when determining what level of discipline is appropriate for a particular offense.

(Tr. at 111.) When asked whether a lieutenant could decide to issue a coaching rather than discipline for an attendance infraction, Scott responded, "Lieutenants have certainly shown discretion in the past for those lower-level things If somebody is 30 seconds late, a lieutenant may choose not to pursue discipline for something like that." (Tr. at 111-112.) All of these facts are undisputed, yet the Regional Director ignores them in rendering his factual conclusions.

The Regional Director also concluded: "The anecdotal testimony regarding disciplines issued by Scott and a captain when they were lieutenants was not supported by any documentary evidence, and for the most part was not based on recent events, and I give it little weight." (DDE

at 31.) Once again, the Regional Director's conclusions in this regard seem to highlight his attempt to draw every possible inference against the Employer.

Contrary to what the Regional Director suggests, there is no rule of evidence or application of Section 2(11) that requires a party to provide documentary evidence to corroborate oral testimony, particularly where the testimony is unrefuted. As such, it is irrelevant that the Employer failed to support the testimony in question with documentary evidence. Moreover, particularly under the "new" rules for election proceedings, an employer has very little time to prepare for a hearing. The Regional Director holds against the Employer its failure to put on a "perfect case," with documents lined up and supporting every piece of testimony that supports the Employer's position, which is just patently unfair. As Chairman Miscamara stated in his dissent in *G4S Regulated Security Solutions*, slip op. at 6, "It does violation to this standard [the burden of proving a supervisory function by a preponderance of the evidence], in my opinion, to disregard relevant evidence merely because the majority believes the Respondent should have introduced yet more evidence."

In addition, contrary to the Regional Director's conclusion, the testimony provided on this subject was not anecdotal, but specific and detailed. Scott testified about a specific written warning he issued to Security Officer Camille Harrison, the year in which the discipline was issued and the nature of the offense, as well as the process he went through in making his decision to issue discipline, and introduced the disciplinary notice into evidence. (*See supra* at 9-10; Tr. at 82-86; Employer Exhibit 10, Attachment C.) Bonnell similarly testified about an incident for which he issued discipline to Security Officer Albert Denis, providing detailed information on the underlying incident, when it occurred and the decision making process he went through in deciding to issue discipline. (*See supra* at 14-15; Tr. at 133-134, 144.)

The Regional Director also discounted this evidence because it was not based on “recent events.” This conclusion was erroneous, as well. First, the discipline about which Bonnell testified was issued in 2016, which is quite recent. (Tr. at 144.) Second, the discipline about which Scott testified was issued in 2013, which is not that long ago either, particularly where the lieutenants’ authority to issue discipline in that regard had not changed in the interim, (other than the steps taken to reinforce the expectation that lieutenants exercise their authority in this regard). As Chairman Miscamara stated in his dissent in *G4S Regulated Security Solutions*, 362 NLRB. No. 134, slip op. at 6, “the date of the disciplinary notices does not diminish their probative value absent evidence that the lieutenants’ duties have changed in the interim.” As such, the Regional Director erroneously ignored this specific evidence of discipline issued by lieutenants.

The Regional Director next decided: “Although lieutenants may choose to issue a coaching instead of a warning in certain instances, coachings are considered non-disciplinary, and the issuance of a coaching does not appear to result in discipline for subsequent infractions of the same nature. Despite the testimony that lieutenants may counsel or coach a SO [Security Officer] for a first offense and issue a discipline to the same SO for a second such offense, only two documented coachings were entered in evidence, and there is no evidence of a warning notice being issued for an offense for which a SO had previously received a documented coaching from a lieutenant. In addition, the coaching form and Employer policy specify that a coaching is non-disciplinary, and do not contain any link between documented coaching and discipline.” (DDE at 31.)

There a number of problems with the Regional Director’s conclusions stated above. First, the Regional Director erred in failing to account for the key relevance of the lieutenants’ issuance of a coaching – the lieutenants’ authority and discretion to issue a coaching instead of initiating the disciplinary process. (Assuming, *arguendo*, that lieutenants can only issue discipline after

receiving explicit instruction to do so from a captain or other superior, as the Regional Director seems to believe, it still is undisputed that lieutenants have the authority to issue a coaching rather than even consult with a superior about the underlying incident.) The authority to issue discipline includes the ability to decide not to exercise the authority to issue discipline, and issue a non-disciplinary coaching instead.

Second, just like the counseling forms in *Oak Park Nursing Care Center*, 351 NLRB 27 (2007), the coachings in this case do lay a foundation for future discipline. Regardless of what may be contained in the Employer's Progressive Discipline Policy, the testimony in this regard is undisputed. (Tr. at 147 (Bonnell testified in response to questioning by the Hearing Officer that past coachings are considered in determining whether to issue discipline in the future for similar misconduct), 216 (Campbell admitted on cross-examination that past coachings might be considered in the issuance of discipline for future, similar infractions, depending on the type of infraction).) As the Board found in *Oak Park Nursing*, the lieutenants are "vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee" because they issue coachings and disciplinary actions that "constitute a form of discipline because they not only affect an employee's job status, i.e., suspension or discharge, . . . but they also lay the foundation for future discipline. . ." and because they "alone decide whether the conduct warrants a verbal warning or written documentation." 351 NLRB at 28-29.

Third, the Regional Director discounted the importance of the coachings just because only two documented coachings were entered into evidence. Once again, there is no rule that requires a party to introduce written evidence to corroborate oral testimony, particularly where that oral testimony was not refuted. Scott testified about coachings he issued to Security Officers Rafael

Del Pino Lopez and Richard Rafford while he was a lieutenant, decisions he made on his own and for which he could have decided to issue discipline instead in both situations. (*See supra* at 17-19; Tr. at 88-89.) Scott also testified about a similar situation where he issued a coaching to Security Officer Chris Rugel while Scott was a lieutenant. (Tr. at 90-91; Employer Exhibit 11 at 3, a copy of which is attached hereto as Attachment “E.”) In addition, Bonnell testified that he routinely issued coachings while a lieutenant when he could have issued discipline, and that he did so without consulting with his captain. (Tr. at 135-136.) And Bonnell also testified that, as a captain, he sees coachings issued by lieutenants that report to him approximately six times per month. (Tr. at 135-136.) Once again, the Regional Director seems to hold against the Employer its failure to present a “perfect case,” and introduce every possible document that might support its position, despite the fact that the Employer had very little time to prepare for the Hearing.

One of the twelve listed supervisory functions under Section 2(11) of the Act is the authority to discipline other employees. As such, lieutenants are statutory supervisors if they have the authority to issue discipline to their subordinates, exercise that authority using their independent judgment and not merely in a routine or clerical manner, and do so in the interest of the Employer.

As outlined above, the Employer presented sufficient, detailed and relevant evidence to meet its burden of proof on this issue. It was improper for the Regional Director to ignore (or otherwise minimize the impact of) this evidence, particularly based on his contention that the Employer should have presented additional evidence. As Chairman Miscamara stated in his dissent in *G4S Regulated Security Solutions, supra*, slip op. at 6, “It does violation to this standard [the burden of proving a supervisory function by a preponderance of the evidence], in my opinion, to disregard relevant evidence merely because the majority believes the Respondent should have

introduced yet more evidence.” As such, the Regional Director’s decision on numerous substantial factual issues regarding the lieutenants’ authority to issue discipline is clearly erroneous on the record. Such errors prejudicially affected the rights of the Employer since the Regional Director’s mistaken factual conclusions led to his mistaken legal conclusion that the lieutenants do not have authority to issue discipline under Section 2(11) of the Act.

B. Role of Response Team Leader in Force-on-Force

The Employer contends the lieutenant’s role as Response Team Leader in a Force-on-Force situation, actual or drill, demonstrates the lieutenants’ authority to “assign” and/or “responsibly direct” under Section 2(11). The Regional Director made the following findings relative to the evidence presented by the Employer in support of these arguments. First, he determined, “There is no evidence of an actual attack or threat requiring deployment of the response team, but the Employer has conducted drills requiring deployment of a response team. In Project Manager Scott’s experience as a lieutenant, as a response team leader he has led two to three armed SOs in drilled response.” (DDE at 6 n.3.)

Second, the Regional Director concluded, “Each security squad completes at least one annual full-scale drill of a “security contingency” event, with certain employees playing the part of intruders while others practice defending. At least annually, the NRC observes a full-scale drill to ensure the readiness of the security team to respond in the event of a terrorist attack. Other small-scale drills occur with the use of a tabletop model of the facility. In these drills SOs and lieutenants move game pieces representing themselves around the model while the circumstances of the drill are announced.” (DDE at 6.)

The Regional Director also determined, “The Employer contends that lieutenants exercise supervisory authority with respect to the assignment of work in the occasional force-on-force trainings, during which lieutenants direct specific movements of SOs in response to mock attacks on the Turkey Point nuclear power facility. However, the direction of such discrete tasks in the context of training exercises held only occasionally does not constitute the exercise of supervisory authority with respect to the assignment of work. The assignment must instead affect an employee’s shift, place of work or department, and overall duties. SOs’ overall duties are dictated by their job description and the general purpose log that exists for their particular assigned post.” (DDE at 33.)

Based on the Regional Director’s conclusions set forth above, he first seemed to suggest that the fact that there has not been an actual attack or threat means that the lieutenants do not have the authority to assign based on their role as Response Team Leader in responding to such an attack. Quite simply, that is an absurd conclusion. The defense of a nuclear power plant like Turkey Point in the event of an attack is the primary purpose served by the Employer. The fact that none of the lieutenants have had to perform this function in response to an actual attack on Turkey Point does not diminish the tremendous importance of this role if such an attack ever should happen or the authority of the lieutenants in carrying out their role in the event of an attack.

The Regional Director also seemed to suggest that the fact that the Response Team Leader might only lead two or three security officers at any given moment in time renders such authority irrelevant. Section 2(11) does not dictate some threshold for the number of employees over whom a putative supervisor must exercise authority to satisfy Section 2(11). Yet the Regional Director seeks to impose such a threshold and then hold the Employer to that threshold as part of its burden in this case. However, no such threshold exists. As such, if lieutenants exercise independent

judgment in assigning officers when responding to an attack or threat, it is irrelevant whether that authority exists over two or three security officers, or two or three hundred security officers.

The Regional Director also dismissed this authority as insufficient under Section 2(11) because it is exercised only occasionally. First, that is factually incorrect. All lieutenants are qualified to fill this role and one lieutenant is assigned as the Response Team Leader on every shift. (Tr. at 77.) In addition, live drills are conducted for entire teams six to eight times per year, plus live drills are conducted for smaller groups every quarter. (Tr. at 162). In addition to all those live drills, other mock up drills (“tabletop drills”) are completed. As such, the lieutenants’ role in this regard is not nearly as occasional as the Regional Director suggests. The issue is whether the putative supervisor has the authority in question, not the frequency with which that authority must be exercised. Yet, once again, the Regional Director seems to hold the Employer to some requisite numerological threshold that does not exist under the Act.

The Regional Director also downplayed the factors considered by the lieutenant and the decisions made by the lieutenant, suggesting these are just discrete tasks made only in the context of training. However, the undisputed record evidence demonstrates the decisions made by lieutenants in these situations, potentially life-or-death situations for the officers under the lieutenants’ command as Response Team Leader. The Employer presented specific, detailed testimony on this topic, explaining the lieutenants’ role as Response Team Leader; how a lieutenant must make decisions based on his or her training, skills and experience; the various factors and variables a lieutenant must consider in making these decisions; how the lieutenant must then apply all those factors into the decision making process in deciding how to deploy the security officers under his or her command at that time, and the serious impact the lieutenant’s decisions will have on the health and safety of each of those officers, as well as everyone else at Turkey

Point and the general public. (*See supra* at 20-24; Tr. at 73-81, 198-199.) The Regional Director all but ignored all of this detailed evidence.

The Regional Director also found the lieutenants' role in this regard insufficient to support supervisory status because it does not affect shift, place of work or department or overall duties. As the Board explained in *Oakwood Healthcare*, 348 NLRB 686, 689 (2006), however, "we construe the term 'assign' to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. . . . The assignment of an employee . . . to certain significant overall tasks (e.g., restocking shelves) would generally qualify as 'assign' within our construction. . . . For example, there can be 'plum assignments' and 'bum assignments' -- assignments that are more difficult and demanding than others. The power to assign an employee to one or the other is of some importance to the employee and to management as well." As such, the power to assign an employee to a "bum" or "plum" assignment constitutes the authority to assign under Section 2(11).

In responding to an attack or threat, real or imagined, the security officers who are on the response team have a place of work and assignment based on what the lieutenant tells them. As explained in detail above, such assignments include being deployed in a safe position behind cover or running out into the open, potentially facing enemy fire. Depending on how the lieutenant assigns those officers, a different assignment could be the difference between getting injured or killed or remaining safe. Such differences in assignment certainly constitute the difference between a "plum" or "bum" assignment. Yet the Regional Director all but ignores the lieutenants' weighty and important role in assigning security officers in these situations.

Finally, the Regional Director concluded that the lieutenants do not use independent judgment because the officer's responsibilities are dictated by job description, or general purpose log. But the Regional Director's conclusion in that regard is erroneous. While many other aspects of a security officer's responsibilities may be set out in a job description or log, the undisputed testimony demonstrated that the security officer's role on the response team is to do what the lieutenant acting as Response Team Leader says, deploying when and where the lieutenant says, attacking the enemy when and where the lieutenant says, running from behind cover out into the open and into potential enemy fire when and where the lieutenant says. None of that is covered by a job description or general purpose log.

The Regional Director's erroneous factual conclusions led the Regional Director to conclude that the lieutenants do not have the authority to assign based on their role as Response Team Leaders. Like his factual conclusions, his legal conclusion was wrong, which prejudiced the rights of the Employer because it allowed an election to proceed for a group of statutory supervisors.

Similarly, the Regional Director's incorrect factual conclusions led him to the wrong conclusion that the lieutenants' role as Response Team Leader does not also constitute the authority to "responsibly direct" under Section 2(11). In addition to the authority to assign, the role of lieutenants in a Force-on-Force also constitutes the authority to "responsibly direct" under Section 2(11) of the Act.

In acting as a Response Team Leader, a lieutenant is accountable for the actions of the security officers he or she directs. The interest of the Employer, as well as the client and the public, is to protect the site from attack that could lead to the release of radioactive material into the air.

While the security officers may have a similar interest generally, the ones deployed in the heat of the moment by a lieutenant based on variables on the ground have a more urgent and pressing interest in being deployed in a way that minimizes the chance that they are shot and then injured or killed as a result. The lieutenant making these decisions must put the Employer's interest in protecting the site ahead of the security officers' interest in staying safe. As such, the lieutenants are supervisors under Section 2(11) based on their authority to responsibly direct employees.

On this point, the Regional Director stated: "I also find that there is insufficient evidence to show that lieutenants responsibly direct work. In this regard, the Board concluded that there was insufficient evidence that lieutenants at another nuclear power plant, in which the facts are very similar to those in the instant case, responsibly direct the work of security officers: .. the Employer has not established that lieutenants use independent judgment in directing employees in tactical . . . situations. [F]or tactical direction, various witnesses testified that each area and post had very detailed response plans and standard procedures governing responses to real or simulated incidents and emergencies. Although there was testimony about some variables a lieutenant might consider in giving direction, it is vague and lacks even general examples of choices lieutenants make in tactical situations. Id." (DDE at 33-34.)

Even though no two cases are the same factually, the Regional Director holds against the Employer in this case an employer's inability in a different case to present sufficient evidence to meet its burden of proof on (admittedly) a similar situation concerning a different nuclear facility, *G4S Government Solutions, Inc.*, 363 NLRB No. 113 (2016). Unlike the employer in that case, however, the Employer in this case presented detailed and specific testimony about the factors a lieutenant must consider in his or role of Response Team Leader, how the lieutenant must analyze those factors and make independent decisions, and how those decisions directly impact the health

and safety of the officers under the lieutenant's command at that time. (*See supra* at 20-24; Tr. at 73-81, 198-199.) As such, it was error for the Regional Director to hold the employer's failure to meet its burden of proof in that other case against the Employer in this case.

C. Post Swaps

The Regional Director concluded that, "Although lieutenants may decide to approve a swap of posts for SOs within a shift, there is insufficient evidence to establish that they exercise independent judgment in deciding whether to approve the swap. Instead, the lieutenants' decision making in approving mid-shift swaps appears to be routine or clerical in nature, and appear to be based on SO preferences. Such swap requests are generally approved unless there is some reason, like a medically compelled light duty assignment, which prevents the swap." (DDE at 33.)

The Regional Director's conclusions, however, are erroneous. The undisputed record evidence demonstrates that lieutenants consider a variety of factors in making the decision whether to approve a post swap, and use independent judgment in doing so. Specifically, lieutenants consider "requirements that were going to be happening at that post that day;" "certain conditions that were there that I did not want a certain individual there or what other purpose I decided and didn't allow that post change;" "there were maybe some work activities or some condition to that post that maybe the individual is not aware of that I was aware of that I didn't think that individual was the best candidate for that position at that time;" his knowledge of the individual; his experience and relationship with the individual; his experiences with the individual "as far as what he was able to do or not;" and the individual's abilities or needs (such as the need to be closer to a restroom that day). (*See supra* at 24-25; Tr. at 141-143.) Based on a consideration of the above-outlined factors, lieutenants decide whether or not to approve such requests. As former Lieutenant

Bonnell testified, based on his review of these factors, he would approve or, on occasion, deny such requests. (Tr. at 141.)

Based on security officer preferences, some posts are “plum” posts and some are “bum” posts. Since lieutenants have the authority to decide whether a security officer is assigned to a “plum” post or a “bum” post, lieutenants have authority to assign employees under Section 2(11). *Oakwood Healthcare*, 348 NLRB at 689. The Regional Director’s erroneous factual conclusions on this issue led to his erroneous legal conclusion, which prejudiced the Employer since an election was directed of a unit consisting solely of statutory supervisors.

D. Fitness for Duty

As part of their responsibilities, lieutenants also have to ensure that security officers are fit for duty. On this point, the Regional Director merely concluded as follows: “If, during mid-shift, a lieutenant performing a post inspection finds that a SO [Security Officer] is inattentive or otherwise not fit for duty, the lieutenant relieves the SO until the deficiency is rectified (if necessary for the rest of the shift) or calls a spare SO who is on duty to man the post. The record is not clear about the extent to which extra officers are scheduled or available. The post must be covered. Lieutenants may relieve SOs from their posts for various reasons; for example, so the SO may get equipment, use a restroom, or get coffee.” (DDE at 10.)

In reaching the above conclusion, however, the Regional Director ignored all of the other (undisputed) facts demonstrating that the lieutenants exercise independent discretion in determining whether a security officer is not fit for duty and, if relieved for that reason, can be sent home and lose pay. As Project Manager (and former Lieutenant) Scott and Lieutenant Campbell testified, in making such determinations, lieutenants must consider a number of variables such as

the lieutenant's experience with that officer, the officer's personality type, how the officer normally presents himself or herself in terms of posture, the way the officer is speaking and his or her mannerisms. (*See supra* at 4-6; Tr. at 56-57, 194-196.) In doing so, the lieutenant must compare and contrast various data, such as the officer's normal behavior, the officer's behavior on the day in question, whether the officer is slurring his or her words, whether there is a smell of alcohol, whether the officer appears drowsy or confused, how energetic the officer is compared to normal, whether the officer has family issues at home. (Tr. at 56-57, 194-196.) Based on the lieutenant's consideration of the above-outlined factors, the lieutenant then must decide whether to take some action, such as relieve the officer for a few minutes to take a break or, if the situation warrants, relieve the officer entirely. That could lead to the officer being sent home for the day and losing pay. (Tr. at 56-57, 194-196.)

The authority to relieve an employee from duty is a form of authority to suspend under Section 2(11). *See, e.g. Capital Transit Co.*, 114 NLRB 617, 627 (1955); *see also Mid-West Paper Products Co.*, 223 NLRB 1367, 1378 (1976) (although it is unclear which one of the 12 supervisory functions under Section 2(11) was applied, "guard sergeant" found to be a statutory supervisor based, in part, on his authority to relieve a guard who was unfit for duty); *Yellow Cab Co.*, 208 NLRB 141 (1974) (assistant managers deemed to be supervisors based in part on authority to send drivers home if reported to work unfit for duty); *Rohm & Haas Co.*, 60 NLRB 554, 557 (1945) (lieutenants found to be statutory supervisors because they "may discipline guards to the extent of sending one home if he appears unfit for duty"). Since lieutenants have the authority to relieve officers who are not fit for duty and they exercise that authority based on their independent review of various factors and comparing data about the officer's normal behavior to his or her behavior on the day in question, lieutenants have the authority to suspend under Section 2(11). Once again,

however, the Regional Director's erroneous factual conclusions led to an erroneous legal conclusion, which prejudiced the Employer.

E. Role in the Hiring Process

The Regional Director determined: "... a lieutenant's role on the Employer's hiring boards, which has only occurred on a single instance by a single lieutenant to date, is merely advisory, and is insufficient to establish that lieutenants have authority to hire or effectively recommend the hire of employees. The process for hiring includes many components, only one of which is the applicant's interview with the panel members. Although Project Manager Scott testified that the lieutenant's input led to the rejection of an applicant Scott might otherwise have hired, this was in response to a leading question and I give this testimony little weight. Moreover, there is insufficient evidence to show that the lieutenant made an effective recommendation as to any applicant who the Employer decided to hire." (DDE at 34.)

The Regional Director's above conclusions were erroneous. There is nothing in the record to suggest that Lieutenant Boza's role in the hiring process was merely advisory in nature, but that he provided input along with other team members and that his input was meaningful and relevant. (*See supra* at 25.) Scott testified specifically about how Boza's opinion on one applicant led directly to that applicant not being offered a position:

Q. Do you recall approximately how many candidates were interviewed as part of the process that Lieutenant Boza was involved with.

A. Between 10 and 15.

Q. Did Lieutenant Boza ever have a different opinion than you regarding any of the candidates?

A. Yes. Yes. We agreed on many of the candidates. There was one candidate in particular that I felt would have made a quality applicant. Lieutenant Boza did

not, and he swayed me in that direction based on his evaluation of the candidate's responses during the interview process.

Q. What was the result for that candidate based on Lieutenant Boza's swaying your opinion on that?

A. We did not hire him.

Q. Do you believe you would have offered that person a position by for Lieutenant Boza's input?

A. Yes.

(Tr. at 124-125.) As such, it is clear that the Regional Director erroneously concluded that Boza's role in the process was merely "advisory" in nature.

In concluding that "the process for hiring includes many components, only one of which is the applicant's interview with the panel members," (DDE at 34), it is unclear on what record evidence the Regional Director reached that conclusion. While the Employer does not mean to suggest that a hiring process would not normally include several components, the record evidence in this case shows only that the interview process was a key component of the hiring decision, that a lieutenant was part of one of the teams that interviewed between 10 and 15 applicants and that Boza's input was treated as an effective recommendation not to hire one applicant where his opinion differed from Scott's and other team members.

The Regional Director found that, "Although Project Manager Scott testified that the lieutenant's input led to the rejection of an applicant Scott might otherwise have hired, this was in response to a leading question and I give this testimony little weight." Quite simply, that is not what the record demonstrates. As quoted above, Scott's testimony in this regard was not in response to a leading question, and it should be noted that Petitioner's counsel did not offer any objection on that basis to the questions at issue. (Tr. at 124-125.)

Based on the Regional Director's factual errors set forth above, he then concluded, "there is insufficient evidence to show that the lieutenant made an effective recommendation as to any applicant who the Employer decided to hire." (DDE at 34.) In reaching this conclusion, the Regional Director seems to imply that he would have reached a different conclusion if there was evidence that Scott hired someone only after Lieutenant Boza recommended that Scott do so, where Scott otherwise would not have hired that person but for Boza's recommendation. The authority to hire or make an effective recommendation on a hiring decision does not turn on whether that recommendation leads to an applicant being hired or not being hired. The relevant inquiry is whether the putative supervisor has a meaningful role in the decision-making process that leads to the decision to hire or not hire. The Regional Director mistakenly ignores that the authority not to hire is just the flip side of the authority to hire under Section 2(11) and, as such, similarly constitutes the requisite authority to hire under Section 2(11). And, it is undisputed that Boza helped interview and provide input relative to at least ten applicants in that "single instance" referred to by the Regional Director.

The Regional Director also determined that lieutenants do not have the authority to hire because this has "only occurred on a single instance by a single lieutenant to date." (DDE at 24.) Once again, the Regional Director seems to be placing some numerological threshold on the Employer that does not exist under the law. Scott testified that this is a new thing – including a lieutenant in the hiring process relative to security officers. Because the Employer hires by classes, there has not yet been another occasion for this to happen. But the undisputed testimony is that Scott will continue to include lieutenants in this process going forward. (Tr. at 125.)

Under Section 2(11) of the Act, an individual is a supervisor if he or she has authority to make effective recommendations regarding who should be hired. The undisputed record evidence

demonstrates that lieutenants have such authority in this case. The Regional Director's decision on these undisputed facts was erroneous and, based on those errors, he reached the wrong conclusion on the lieutenants' supervisory authority. Since these errors prejudicially affected the rights of the Employer, the Board should grant review.

V. CONCLUSION

For the foregoing reasons, the Board should grant the Employer's request for review of the Regional Director's Decision and Direction of the Election, set aside the election and Certification of Representative, and dismiss the Petition or, in the alternative, grant the request for review and allow additional briefing on the merits.

/s/ Fred Seleman
Vice President, Labor & Employment Law
G4S Secure Solutions (USA) Inc.
1395 University Boulevard
Jupiter, FL 33458
Phone: 561.691.6582
Fax: 561.691.6680
Email: fred.seleman@usa.g4s.com

Certificate of Service

On November 14, 2017, the foregoing was filed electronically with the Board and the Regional Director for Region 12, and a copy served by way of electronic mail on James M. Moore, Counsel for the Petitioner, at jim@unionlaw.net.

/s/ Fred Seleman
Vice President, Labor & Employment Law
G4S Secure Solutions (USA) Inc.